Supreme Court, U.S.
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In The

Supreme Court of the United States

PETRO LUGOVYJ,

Petitioner,

v.

ERIC H. HOLDER, JR.,
Attorney General of the United States,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Petitioner owned an auto parts store in post-Soviet Ukraine. He was the target of threats and extortion demands from people the petitioner referred to as mafia, thugs, and believed them to be probably connected to the government. The threats turned to violence when the people beat him into unconsciousness. The petitioner fled Ukraine and entered the United States without inspection. He applied for withholding of removal under Section 241(b)(3) of the Immigration and Nationality Act and under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85.[1]

Were the threats and harm inflicted on the petitioner on account of his membership in a particular social group?

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[1] The petitioner is not petitioning for review of the issue whether he is eligible for protection under CAT.

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The lower court decisions are attached as an Appendix. The 6th Circuit Court of Appeals opinion appears at pages 1 to 7. The Board of Immigration Appeals (BIA) decision appears on pages 8 to 13. The Oral Decision and Order of the Immigration Judge sitting in Detroit, Michigan appears at pages 14 to 38. An Order Staying Removal by the 6th Circuit Court of Appeals appears at pages 39 to 40. None of the decisions were published.

JURISDICTION

The judgment of the Court of Appeals was entered on November 16, 2009. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

RELEVANT PROVISIONS OF THE LAW

8 U.S.C. §1231(b)(3)

[T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, *membership in a particular social group,* or political opinion. (Emphasis added).

STATEMENT OF THE CASE

Factual Background

The petitioner was born in Ukraine and lived there until his early twenties. He owned and operated an auto parts business in his hometown in Ukraine. Beginning in 1998 and continuing over a year, groups of three to five people repeatedly threatened him and demanded payment of half his income from his business. He refused to pay because he believed that since he was already paying taxes to the government, these people "had no right to collect money again." The petitioner believed that they were probably connected to the government of Ukraine. The petitioner reported these threats to the police, but did not want to file a formal report. He believed that the Ukrainian government would not protect him. The Immigration Judge found that the petitioner's testimony was credible.

The threats culminated into a severe physical beating. The petitioner was beaten into unconsciousness with something resembling a baseball bat. He suffered severe head trauma as corroborated by a medical report. He was treated by a doctor in his home who recommended that he should be treated in the hospital. The petitioner did not want to go to hospital because, if he did so, the hospital would have to file a report about the incident. He feared retaliation, stating that "if you give out our names you will not be alive in this world." Jt. App. p. 86. He was aware of other business owners that were beaten

because they refused to give into extortion demands. Nevertheless, the petitioner's father reported the attack to the police. The attack was also reported in the local newspaper. The record does not reveal if the police took any action or if anyone was arrested.

After this incident, the petitioner closed his business and fled Ukraine in late 1999. He entered the United States without inspection across the U.S.-Mexican border.

Two years after the attack, the petitioner's brother was killed in an auto accident in Ukraine. His father believed the accident was staged because it occurred after someone approached him and demanded to know where the petitioner was. The autopsy report indicated that the injuries suffered by his brother were not consistent with a minor car accident but more likely caused by a beating. In 2006, his younger brother was also beaten when he refused to give into the extortion demands or reveal the whereabouts of the petitioner.

Procedural Background.

The petitioner was served with a Notice to Appear in 2003. At his Master Hearing, the petitioner admitted to all the allegations and conceded to deportability. He applied for withholding of removal and protection under Article III of the Convention

Against Torture.[2] The Master Hearing was held in December 2006. The petitioner testified, and submitted documents which included his medical report, the news article about the beating, U.S. Department of State Country Reports, Amnesty International articles regarding police brutality and torture, news and scholarly articles covering government corruption and the economy.

The IJ found that the petitioner was credible, but denied both applications for relief. She determined that the case lacked a nexus to a protected ground because it was a case where the attackers were motivated only by money. The BIA adopted the IJ's decision in its entirety and addressed the additional issue of whether the petitioner belonged to a social group. The BIA determined that he did not belong to a social group because the group lacked social visibility. It also relied on its precedential opinion that criminal extortion is not persecution on account of a protected ground. Finally, the BIA stated that the petitioner failed to present sufficient evidence that the criminals were acting with impunity because of corrupt government officials.

The 6th Circuit Court of Appeals adopted and affirmed the BIA's decision. It also determined that the case lacked evidence of a nexus and that the

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[2] The petitioner was time barred from filing an application for asylum. He is also not petitioning for review of his claim under the Convention.

claimed social group did not have a shared cognizable immutable characteristic other than the risk of being persecuted.

REASONS FOR GRANTING THE PETITION

A. This Court should grant this petition because there is a conflict between the federal appellate courts on how to define a particular social group for asylum and withholding purposes.

1. The lower court impermissibly applies the social visibility as a requirement rather than a relevant factor.

The term "social group" was first addressed by the BIA in *In re Acosta,* 19 I&N Dec. 211, 233-34 (BIA 1985), *overruled on other grounds by In re Mogharrabi,* 19 I&N Dec. 439 (BIA 1987). It is one of the five protected grounds found in the definition of refugee in section 101(a)(42)(A) of the Act. Congress derived this definition from the *United Nations Protocol Relating to the Status of Refugees,* 19 U.S.T. 6223, T.I.A.S. No. 6577 (1968) (Protocol). Neither the legislative history nor the Protocol provided any indication of what this term meant. *Acosta*, pgs. 219-220. Therefore, the BIA applied the principle of ejusdem generis (of the same kind), to determine that a social group is a group of persons, all of whom share a common, immutable characteristic that either cannot be changed, or should not be changed because it is

fundamental to the individual identities or consciences of the group members. It stated that the characteristic must be innate such as sex, color, kinship ties, in some circumstances, shared past experience such as military leadership or land ownership.

In a later case involving a Guatemalan woman abused by her husband, the BIA determined that a shared innate characteristic was not enough to establish a social group. *See In re R-A-*, 22 I&N Dec. 906 (BIA 1999). The BIA required that the group be recognized as a separate segment of society by the public or at least by the persecutor. It determined that because the applicant's husband did not target other abused women, the group did not satisfy the definition for purposes of asylum. The decision was vacated by the Attorney General in light of a proposed rule that provided guidance on the definition of particular social group. *See Al-Ghorbani v. Holder*, 585 F.3d 980, 994 (6th Cir. 2009). The proposed rule was specifically written to "remove the barriers" set by BIA in *R-A-*. 65 Fed. Reg. 76588 (Dec. 7, 2000). The proposed rule reaffirmed the simple *Acosta* definition and made it very clear that other factors, such as social recognition, may be considered, but *should not be determinative. Id.* at pg. 76589. However, the proposed rule was withdrawn.

The BIA addressed the issue again in *In re C-A-*, 23 I&N Dec. 951 (BIA 2006), but this time, it adopted the United Nations High Commissioner for Refugees (UNHCR) guidelines published in 2006 to define a

social group. *See UNHCR, Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, ¶U.N. Doc. HCR/GIP/02/02 (May 7, 2002) (UNHCR Guidelines). The new definition also closely followed the INS's definition presented in the proposed rule. The new rule stated that in addition to *Acosta*, other factors such as social visibility *may* be considered.

Most of the Circuit Courts that have rendered precedential decisions after *C-A-*, have accepted this new standard, except the 7th Circuit which rejected it outright.[3] *See Benitez Ramos v. Holder*, 589 F.3d 426, 430 (7th Cir. 2009); *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009).

> This formula . . . makes no sense; nor has the Board attempted, in this or any other case, to explain the reasoning behind the criterion of social visibility. Women who have not yet undergone female genital mutilation in tribes that practice it do not look different from anyone else. A homosexual in a homophobic society will pass as heterosexual. If you are a member of a group that has been

[3] The 3rd Circuit, on the other hand, simply ignored it and relied on the *Acosta* definition alone to determine what a social group is. *See Gomez-Zuluaga v. Attorney General of U.S.*, 527 F.3d 330 (3rd Cir. 2008). The 4th, 5th, and 10th Circuits have not yet issued precedential decisions on the issue of social visibility since the *C-A-* decision was rendered.

> targeted for assassination or torture or some other mode of persecution, you will take pains to avoid being socially visible; and to the extent that the members of the target group are successful in remaining invisible, they will not be "seen" by other people in the society "as a segment of the population." *Gatimi,* at pg. 616.

Although the 7th Circuit Court was aware of the rule of deferring to agency decisions, it declined to do so. The Court explained that:

> [t]he Board has been inconsistent rather than silent. It has found groups to be "particular social groups" without reference to social visibility, ... and ... , refusing to classify socially invisible groups as particular social groups but without repudiating the other line of cases. When an administrative agency's decisions are inconsistent, a court cannot pick one of the inconsistent lines and defer to that one, unless only one is within the scope of the agency's discretion to interpret the statutes it enforces. . . . Such picking and choosing would condone arbitrariness and usurp the agency's responsibilities."

Id. at pgs. 615-16.

Other than the rule not making any sense, the appellate courts have distorted the rule either because they are applying it as a requirement or are

giving it too much weight.[4] *See Scatambuli v. Holder*, 558 F.3d 53 (1st Cir. 2009) (*quoting In re C-A-*, "the very nature of the conduct at issue is such that it is generally out of the public view. . . . [and] visibility is limited to those informants who are discovered." 23 I&N Dec. at 960); *Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 73 (2nd Cir. 2007) ("membership in a purported social group requires a certain level of 'social visibility'. . . ."); *Al-Ghorbani*, at pg. 996 (individuals who were "identified by their community as persons opposing Yemen's traditional, paternalistic, Islamic marriage traditions" was a social group); *Davila-Mejia v. Mukasey*, 531 F.3d 624, 629 (8th Cir. 2008) (the petitioners "failed to establish that their status as 'competing family business owners' gave them sufficient social visibility to be perceived as a group by society."); *Ramos-Lopez v. Holder*, 563 F.3d 855, 862 (9th Cir. 2009) ("There is no evidence in the record that young men who have been recruited by the MS-13 in Honduras are generally visible to society"); *Soriano v. Holder*, 569 F.3d 1162, 1166 (9th Cir. 2009) [citing *Santos-Lemus v. Mukasey*, 542 F.3d 738, 745-46 (9th Cir. 2008) and quoting *In re S-E-G-*, 24 I&N Dec. 579, 586 (BIA 2008) ("[s]ocial visibility requires that 'the shared characteristic of the group should generally be recognizable by others in the community.'").]

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[4] The 7th Circuit in *Benitez Ramos* stated that social recognition indicates only the "likelihood of persecution," not whether there is persecution. *Id.* at pg. 430.

In this case, the assailants would harm the petitioner regardless of whether businessmen stand out in Ukrainian society. Lack of visibility or recognition merely makes it harder for persecutors to seek out their victims.

2. The 6th Circuit court and the appellate courts inconsistently apply the rule that members of a group must share a characteristic other than the risk of persecution.

The 6th Circuit determined that the only shared characteristic of petitioner's purported group was their risk of persecution. App. 6. The Court rejected petitioner's claim that he was a member of a group of business owners "who resist the activities of criminal organizations and corrupt Ukrainian officials." However, the court failed to consider the group in the context of country conditions. *Al-Ghorbani* at pg. 994, citing *In re S-E-G-*, 24 I&N Dec. 579, 586-87 (BIA 2008). In post-Soviet Ukraine, corrupt officials, former party officials, and criminals still control the economy and the customary way of doing business is by corruption and extortion:

> "Even before Ukraine had become independent, criminal elements were major players in the economy, and the intimate connection prevailing among the new entrepreneurs (many of them former state officials), corrupted officials still in government, and criminals was in full flower."

The Two Faces of Crime in Post-Soviet Ukraine, P.H. Solomon, Jr., and T.S. Foglesong, East European Constitutional Review, Summer 2000, appearing at Jt. App. pgs. 170-74.

The lower court's finding contradicts its own precedent set in *Al-Ghorbani.* The court found that people who "actively oppose the suppression of their core, fundamental values or beliefs" may constitute a social group. In this country, an individual's desire to own his own business is as fundamental as the right to marry. *Cf. Al-Ghorbani,* at pg. 996 ("In this country, the right to marry is considered fundamental."), citing *Loving v. Virginia,* 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967).

Other circuits that have recognized that the opposition to the suppression of a fundamental value constitutes a social group. *Al-Ghorbani,* at pg. 996 (citing cases from the BIA, and 3rd, 7th, and 8th Circuit Courts.) Yet, in all these cases, it can be said that each group is circularly defined because the persecution did not begin until the members actively opposed the suppression of their values. For example, the *Al-Ghorbani* decision refers to an 8th Circuit case where it was determined that "Iranian women who advocate women's rights or who oppose Iranian customs relating to dress and behavior" could constitute a social group. *Safaie v. INS,* 25 F.3d 636, 640 (8th Cir. 1994), *superseded by statute on other grounds, as recognized in Rife v. Ashcroft,* 374 F.3d 606, 614-15 (8th Cir. 2004). If the scenario was altered slightly to

read "Iranian women who oppose Iranian customs relating to *business ownership*," the Court below would most likely find that it constitutes a social group. If the same principle is applied to Ukrainian business owners who refuse to participate in the post-Soviet business customs of corruption and criminality, they too should be considered a social group. To hold otherwise would indicate that the Court places more importance on the woman's right to behave and wear clothing as she sees fit over the an individual's right to own his own business as he sees fit.

An equally odd value judgment was made by the BIA in *In re C-A-*, where it did not consider a civilian informant's "civic responsibility" important enough to be a shared characteristic for asylum purposes. An individual's ethics, morality, and choice of doing the right thing despite the risk of being killed, should be considered just as innate and immutable as an Iranian woman's right to wear what she wants. *Cf. Al-Ghorbani* at pg. 996, *quoting Fatin v. INS,* 12 F.3d 1233, 1241 (3rd Cir. 1993) ("if a woman's opposition to the Iranian laws in question is so profound that she would choose to suffer the severe consequences of noncompliance, her beliefs may well be characterized as 'so fundamental to [her] identity or conscience that [they] ought not be required to be changed.'")

The petitioner's opposition to corrupt business customs was so profound that he not only chose to risk the consequences, but he did in fact suffer the consequences. His family suffered too even after he fled Ukraine.

3. The appellate court impermissibly required that the petitioner provide direct evidence of the persecutor's motive in contravention of this Court's ruling in *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 112 S.Ct. 812 (1992) and its own ruling in *Mostafa v. Ashcroft*, 395 F.3d 622 (6th Cir. 2005).

In *Elias-Zacarias*, this Court held that an asylum applicant is not required to provide direct proof and that circumstantial evidence may suffice. *Id.* at pgs. 483, 816-17. Although this case involves withholding of removal where the standard of proof is higher than asylum, circumstantial evidence considered in the aggregate can still show that there is at least a 51% chance that the petitioner would be persecuted. *See In re G-A-*, 23 I&N Dec. 366 (BIA 2002); *Kamara v. Att'y Gen. of the U.S.*, 420 F.3d 202, 213-15 (3rd Cir. 2005); *Khup v. Ashcroft*, 376 F.3d 898, 906-07 (9th Cir. 2004).

The court below dismissed the reports and news articles about country conditions without providing an explanation of why they were not sufficient. In fact, the court did not consider it evidence at all: "[W]hat remains lacking is *evidence* linking the harm suffered by petitioner to a protected ground and to government complicity." App. 5. This is in contravention of its own ruling in *Mostafa* (general political conditions in a country are admissible at a withholding . . . hearing.) *See also, Zubeda v. Ashcroft*, 333 F.3d 463, 477-78 (3rd Cir. 2003); *Melendez v. DOJ*,

926 F.2d 211, 219 (2nd Cir. 1991). It is also well-established law that an applicant's testimony if credible is sufficient to sustain his burden of proof and that Department of State and other documents are sufficient to show a pattern and practice of persecution. *See Niftaliev v. U.S. Att'y Gen.*, 504 F.3d 1211, 1217 (11th Cir. 2007); *Ghebrehiwot v. Att'y Gen. of the U.S.*, 467 F.3d 344, 353-55 (3rd Cir. 2006); *Banks v. Gonzales*, 453 F.3d 449, 452-53 (7th Cir. 2006). The documentary evidence also substantiates that the government is unwilling to protect the alien.

CONCLUSION

The appellate courts are in conflict regarding the definition of social visibility. The decisions by the BIA and the appellate courts have distorted the rule pronounced in *In re C-A-* concerning social visibility, from being a relevant factor into a required one. Finally, the appellate court's dismissal of country background reports and news articles as evidence directly conflicts with its own precedent.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETRO LUGOVYJ, **Petitioner,** **v.** **ERIC H. HOLDER, JR., United States Attorney General,** **Respondent.**	**ON PETITION FOR REVIEW OF FINAL ORDER OF BOARD OF IMMIGRATION APPEALS** **MEMORANDUM OPINION** (Filed Nov. 16, 2009)

BEFORE: MERRITT, CLAY and McKEAGUE, Circuit Judges.

McKEAGUE, Circuit Judge. Petitioner Petro Lugovyj petitions the court for review of a final decision of the Board of Immigration Appeals ("Board") denying his application for withholding of removal under the Immigration and Nationality Act and for protection under the Convention Against Torture. The Board upheld the decision of the immigration judge, who, without making any adverse credibility determination regarding petitioner's claim of having been beaten and robbed in Ukraine in November 1998, held that petitioner had failed to satisfy several

requirements for relief. Specifically, the immigration judge held that petitioner failed to demonstrate: (1) that the violence visited upon him was motivated by a statutorily protected ground; (2) that government officials were responsible based on their having incited or condoned the attack; (3) that he would more likely than not suffer persecution on account of a protected ground if he returned to Ukraine; and (4) that he would more likely than not suffer torture if he returned to Ukraine. On due consideration of the record, we find no error in the Board's final decision.

Where, as here, the Board adopts and affirms the decision of the immigration judge and provides additional reasoning of its own, we review both the decision of the immigration judge and the decision of the Board. *Lazar v. Gonzales,* 500 F.3d 469, 474 (6th Cir. 2007). Legal conclusions are reviewed de novo, but factual findings are reviewed under the deferential substantial evidence standard. *Ramaj v. Gonzales,* 466 F.3d 520, 527 (6th Cir. 2006). Factual findings will be disturbed only if we find that the record evidence not only supports a contrary conclusion, but compels it. *Id.*

Petitioner does not contest the immigration judge's findings that he is subject to removal and is not eligible for asylum. Petitioner maintains, however, that he adequately demonstrated his entitlement to withholding of removal. To qualify for withholding of removal, petitioner must demonstrate a "clear probability" that his life or freedom would be threatened "on account of race, religion, nationality,

membership in a particular social group, or political opinion." *Kouljinski v. Keisler*, 505 F.3d 534, 544 (6th Cir. 2007); 8 U.S.C. § 1231(b)(3)(A).

Although petitioner was unable to identify the three assailants who beat him to the point of unconsciousness and robbed him in November 1998, he believes they were making good on previous threats for refusing to meet their extortionist demands for "protection money." Petitioner contends the extortion and beating were not on account of his race, religion or nationality, but because he was the owner of a profitable automobile parts business and his assailants wanted to make money without having to work. The assailants had demanded that he continuously pay them half of his business income in exchange for their support and protection of his business. When asked if he knew of any connection between the assailants and the Ukrainian government, petitioner said he didn't know, but thought that "probably they were connected." Yet, petitioner contends the harm he suffered was on account of his imputed political opinion and membership in a particular social group. Specifically, he contends he is a member of a group of people who resist the activities of criminal organizations and corrupt Ukrainian officials, that his refusal to accede to the demands for protection money was viewed as opposition to government corruption, and that he was targeted for assault because of his political opinion (i.e., opposition to crime and corruption).

Although there is no doubt that petitioner was the victim of a criminal assault and robbery, the immigration judge and the Board concluded that petitioner's contentions about the assailants' motivations were based on speculation and supposition, and not supported by evidence. The fact that petitioner's brother died in a car accident in 2001 under circumstances petitioner's father reportedly deemed suspicious was accorded little weight because it was too speculative. The record evidence was deemed to support a finding that petitioner was the victim of criminal activity motivated by financial gain, rather than any statutorily protected ground. Further, noting that petitioner admittedly declined to file a written statement with the police to authorize investigation, the immigration judge and the Board concluded that he failed to demonstrate the government was unable or unwilling to protect him or was otherwise complicit in the crime. Having failed to demonstrate that the harm visited on him was the result of government-sponsored persecution based on a protected ground, the immigration judge and the Board also concluded that petitioner failed to demonstrate it was more likely than not that he would suffer cognizable persecution or torture if he returned to Ukraine.

In challenging these determinations, petitioner does not draw our attention to any evidence that was overlooked by the immigration judge and the Board. Rather, he argues that his testimony, coupled with State Department reports of general conditions in

Ukraine, and case law decisions recognizing analogous theories of relief should be accepted as sufficient to sustain his burden of proof. Yet, what remains lacking is *evidence* linking the harm suffered by petitioner to a protected ground and to government complicity.

It is this lack of evidence that distinguishes this case from *Fedunyak v. Gonzales,* 477 F.3d 1126, 1128 (9th Cir. 2007), where a Ukrainian businessman was not only subject to extortion demands by local government officials and beatings for noncompliance, but was also subject to additional persecution in retaliation for his repeated complaints to authorities about local government officials' corruption. Fedunyak's "whistle-blowing" complaints were deemed to represent protected political activity, and the retaliation he suffered for acting against governmental corruption was deemed to justify withholding of removal. Here, in contrast, there is no evidence of governmental involvement in the extortion or the ensuing beating and robbery. Nor is there evidence that petitioner engaged in such political activity as opposing or criticizing the government's participation in or failure to stop the extortion scheme.

Also unpersuasive is the contention that petitioner's mere defiance of unidentified thugs' extortion demands renders him a member of a protected social group. A "social group" is a group of persons all of whom share a "common, immutable characteristic," . . . "a fundamental characteristic that either cannot be changed or should not be required to be changed

because it is fundamental to the members' individual identities or consciences." *Castellano-Chacon v. I.N.S.*, 341 F.3d 533, 546-47 (6th Cir. 2003). Yet, "a social group may not be circularly defined by the fact that it suffers persecution." *Rreshpja v. Gonzales*, 420 F.3d 551, 556 (6th Cir. 2005). "The individuals in the group must share a narrowing characteristic other than their risk of being persecuted." *Id.* It follows that petitioner's attempt to define himself as a member of a social group whose members risk retaliation by resisting crime and corruption is impermissibly circular. The suggested social group is not based on any cognizable immutable characteristic and does not support petitioner's claim that he was persecuted on account of a statutorily protected ground.

The extant record evidence simply falls far short of compelling a conclusion contrary to that reached by the Board in its final decision. Accordingly, we have no alternative but to uphold the Board's final decision denying petitioner's application for withholding of removal and for protection under the Convention Against Torture. The petition for review must therefore be and is **DENIED**.

MERRITT, Circuit Judge, concurring. I concur in the Court's disposition of this case because the refusal of a business man to pay protection money to private individuals who violate local criminal law is not a basis for withholding removal. There does not appear on this record to be a basis for finding that

government officials were in fact implicated in the harm. Petitioner's brother had been appointed as a police officer which, at least on the surface, demonstrates a lack of government hostility. There are many places in the United States where citizens are not safe from harm from criminal activity. The statute we are to enforce, 8 U.S.C. § 1231(b)(3)(A), does not include such threats in the list of grounds for asylum. The statute simply says that the government "may not remove an alien to a country if the Attorney General decides that the alien's life of freedom would be threatened in such country on the count of race, religion, nationality, membership in a particular social group, or political opinion." If asylum were allowed for private threats, probably every country in the world would qualify as a place from which we should withhold removal.

U.S. Department of Justice
Executive Office for
Immigration Review

Falls Church, Virginia 22041

Decision of the Board of
Immigration Appeals

File: A096 421 862 – Detroit, MI Date: OCT 31 2008

In re: PETRO LUGOVYJ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF
OF RESPONDENT: Marshal E. Hyman, Esquire

APPLICATION: Withholding of removal; Convention Against Torture

The respondent is a native and citizen of the Ukraine. He appeals the Immigration Judge's December 5, 2006, decision denying his application for withholding of removal under section 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3), and the protection under the Convention Against Torture. The respondent's appeal will be dismissed. The request for oral argument is denied. *See* 8 C.F.R. § 1003.1(e).

We adopt and affirm the decision of the Immigration Judge with the following additions. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review

of the record coincide with those the Immigration Judge articulated in his or her decision").

The respondent argues on appeal that any harm he suffered was inflicted on account of his membership in a particular social group, namely, persons refusing to "give in to demands of criminal gangs [operating] with impunity because of the actions of corrupt government officials." First, we do not find that the social group proposed by the respondent satisfies the requisite standards of "social visibility" explained in some of or our recent decision. The respondent here failed to establish that his status as a "person refusing to give in to demands of criminal gangs" gave him sufficient social visibility to be perceived as a member of a group by society. *See Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008) (holding that neither Salvadoran youth who resisted or refused recruitment into the MS-13 criminal gang nor their family members constitute a particular social group); *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 74-75 (BIA 2007) (holding that "affluent Guatemalans" did not constitute a particular social group); *Matter of C-A-*, 23 I&N Dec. 951, 959-61 (BIA 2006) (finding that noncriminal informants working against the Cali drug cartel in Colombia were not a particular social group).

Second, the suggested social group is flawed because the respondent does not really know who harmed him, nor is there any indication that their actions were motivated by anything other than financial gain. *See* Tr. at 27, 29. The respondent in

this case specifically testified that he was threatened by persons demanding money because "they don't want to work, they don't want to do anything, they just walk about the businesses, about the firms, and require money from them and beat them." *See* Tr. at 59. Thus, similar to the situation in *Matter of T-M-B-*, 21 I&N Dec. 775 (BIA 1997), the respondent in this case verified that the perpetrators targeted business owners who had money. As we determined in *Matter of T-M-B-*, *supra*, criminal extortion efforts do not constitute persecution on account of a protected ground where there is no indication that the perpetrators had any interest in the respondent beyond his identity as a business owner who had money.

Third, there is no indication that the persons who demanded money from the respondent or the persons who harmed the respondent were operating with impunity because of the actions of corrupt government officials. At his merits hearing, when the respondent was asked if he knew of any connection between the people who were asking for protection money and the Ukranian government, the respondent testified that he did not know about such a connection. *See* Tr. at 41. The respondent also testified that he thought that they were "probably connected." *Id.* Thus, the respondent admitted that he did not know of any specific connection between the criminals and the Ukrainian government. The respondent's conjecture, without more, that a connection may have existed does not sufficiently evidence such a connection. The fact that there is background evidence

which indicates that some government officials in the Ukraine are corrupt, does not result in a finding that any of those officials were involved in this particular case. The respondent specifically testified that the police told him that they would try to do something if the respondent would submit a specific type of "application" concerning his problems, which the respondent said that he refused to do because he thought it was too early to do so. *See* Tr. at 39. Thus, the record does not support the respondent's assertion on appeal that the perpetrators in this case were operating in concert with any government officials.

On appeal, the respondent refers to *Gilaj v. Gonzales*, 408 F.3d 275 (6th Cir. 2005).[1] We note that, in *Gilaj v. Gonzales*, it is clear that the alien's political activities were the basis for her arrest, detention, and a beating by the police. Alternately, in the instant case, the respondent did not know the identity of any of the persons requesting money, nor the identity of the persons who attacked him. There is no indication in this case that the government supported any of the perpetrators. Rather, like the circumstances in *Matter of T-M-B-, supra*, there was

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[1] The respondent also refers to *Fedunyak v. Gonzales*, 477 F.3d 1126 (9th Cir. 2007), which is not binding precedent in the Sixth Circuit. We note, in dicta, that the alien in that case was forced to pay extortion fees to a public official, rather than to unknown persons, and he was punished by the government for refusing to do so and for filing complaints. Thus, the circumstances in that case are distinguishable from those in the instant case.

no indication in this case that any harm was motivated, even in part, by a protected ground.

We further agree with the Immigration Judge's determination that there is insufficient evidence concerning the reason for the respondent's brother's death and concerning the identity of any perpetrator, if one existed. Although the respondent's father guessed that the car accident could have been connected to an incident where the brother was asked about the respondent, there is no evidence beyond pure speculation that this was indeed the case.

In sum, we find that the respondent did not meet his burden of proof for withholding of removal, as there is no indication that any past harm was inflicted on account of a protected ground. *See Matter of T-M-B-*, *supra*. Furthermore, the respondent did not establish that it is more likely than not that he would be persecuted in the future on account of a protected ground. The respondent further failed to meet his burden of proof for protection under the Convention Against Torture, as he failed to demonstrate that torture is more likely than not, or that any past or potential future harm was or would be inflicted by or with the consent or acquiescence of a public official or other person acting in an official capacity. There is insufficient indication that public officials in the Ukraine have been or would be willfully blind to any harm perpetrated against this respondent by non-state actors.

ORDER: Accordingly, the respondent's appeal is dismissed.

/s/ Edward R. [Illegible]
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
U.S. IMMIGRATION COURT
Detroit, Michigan

File A 96 421 862 December 5, 2006

In the Matter of

PETRO LUGOVYJ,	)	IN REMOVAL
	)	PROCEEDINGS
Respondent	)	
	)	(Filed Dec. 18, 2008)

CHARGE:

APPLICATIONS: Withholding of removal under Section 241(b)(3) of the Immigration and Nationality Act and withholding of removal pursuant to Article III of the Convention Against Torture.

ON BEHALF OF THE RESPONDENT:	ON BEHALF OF DHS:
Marshal E. Hyman, Esquire Sheffield Office Park Plaza 3250 West Big Beaver, Suite 529	Thomas O. Martin Assistant Chief Counsel 333 Mt. Elliott Detroit, Michigan 48207

ORAL DECISION AND ORDERS OF THE IMMIGRATION JUDGE

Procedural History

The respondent is a 29-year-old single male, native and citizen of the Ukraine. The Department of Homeland Security (hereinafter) referred to as "the

Government") initiated removal proceedings against the respondent pursuant to the authority contained in Section 240 of the Immigration and Nationality Act (hereinafter referred to as "the Act"). Proceedings were commenced with this Court by the filing of a Notice to Appear dated July 28, 2003.

At a prior hearing held before the Court, respondent, through counsel, admitted all four factual allegations contained on the Notice to Appear and conceded the sole charge of removability under Section 212(a)(6)(A)(i) of the Act. Based upon respondent's admissions and concessions, this Court finds that respondent's removability has been established by the requisite clear and convincing evidence. Respondent declined to designate a country to which removal would be directed and the Court designated Ukraine.

The respondent requested the opportunity to pursue an application for withholding of removal under Section 241 (b)(3) of the Act. Alternatively, respondent requested that this Court consider his application to be one seeking protection under Article III of the Convention Against Torture (hereinafter referred to as "the Torture Convention").[1]

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[1] The respondent conceded (and the evidence establishes) the respondent is statutorily ineligible to pursue an application for asylum as he failed to file that application within one year of his arrival in the United States. Respondent claims an arrival date in the year 1999. The respondent's written application was

(Continued on following page)

Evidence Presented and Summary of Respondent's Claim

In addition to the Notice to Appear admitted into the record as Exhibit 1, several other documents were offered and admitted into the record. Admitted into the record as Exhibit 2 is the respondent's written application seeking both forms of withholding. Attached to that application were Tabs B through J which consisted of several documents relating to a purported beating respondent sustained while in the Ukraine, and resulting injuries. The documents attached to the application in Exhibit 2 also consisted of several Department of State Country Reports and articles regarding country conditions in the Ukraine.

Before admitting the written application into the record as Exhibit 2, this Court inquired of the respondent and his counsel as to whether respondent had any changes, amendments, or corrections to make to the application. One change, amendment, or correction was made. Thereafter, respondent swore to the truth of the contents of this application and all documents submitted in support of that application.

Admitted into the record as Exhibit 3 was the Government's Exhibit list containing Tabs A and B, which consisted of the U.S. Department of State Country Reports on Human Rights Practices for the Ukraine for the year 2005, and a Profile of Asylum

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not received and filed with this Court until October 29, 2004. Therefore, asylum is not before this Court for adjudication.

Claims and Country Conditions for the Ukraine, dated June 1999.

Finally admitted into the record as Exhibit 4 were additional documents tendered by the respondent at Tabs L through X, which consisted of numerous reports and news articles (including reports from Amnesty International) regarding country conditions in the Ukraine.

The above constituted the documentary evidence of record in this case. In addition to the respondent's written application and supporting documents, respondent offered his testimony in support of his claims for relief and protection. Respondent was the only individual to testify in these proceedings. Based upon a review of the respondent's written application and his testimony, the basis of the respondent's withholding claims (both under the Act and the Torture Convention) can be summarized as follows:

The respondent testified that he was born in Zbora, Ukraine, which is near the city of Kalus, Ukraine. The respondent testified that during the year 1998 to 1999 that he was the owner of an auto parts store (a store that sold auto parts). The respondent testified on direct examination that he had problems due to his ownership of this business. There problems centered upon individuals which the respondent described in his written application (see Exhibit 2, Part B, pages 5 and 6) as "mafia" and "thugs." He testified that these individuals requested or demanded that he pay one half of his income or

profits from the auto parts store. The respondent ultimately testified that these individuals, or these mafia, or these thugs were demanding "protection money" from him. He also refers to the monetary demand as protection money in his written application (see Exhibit 2).

The respondent stated that these unknown mafia individuals or thugs repeatedly threatened him. He reported these threats to the police. However, the police indicated that they would try to deal with or handle the problem but wanted the respondent to essentially submit a written statement, or affidavit, or report of these incidents. Respondent testified that he decided not to submit a written report, or statement, or affidavit because it was his opinion that it was too early to make such a written statement as there had only been threats made against him.

In any event, the respondent testified that in November 1998, three of these thugs, or mafia members, came and attacked him physically. He testified that he did not see their faces. He testified that he was attacked as he was walking home from a friend's house. He testified that these three individuals purportedly approached him and asked for a "smoke." When he reached into his pocket for his cigarettes, he testified that they began beating him and took his money. He testified that he was hit in the back of the head with a hard object such a baseball bat or stick. Two people held him by the arms while the third person hit him. He lost consciousness. He regained

consciousness while his friends (who purportedly found him on the street) were transporting him home.

He testified that a doctor came to his home and treated him. The doctor recommended that the respondent be admitted into the hospital however, the respondent made the decision that he did not wish to be admitted into the hospital. He made this decision because he testified that while this beating was occurring (and before the beating began), that these unknown thugs threatened that he should not report anything or they would find him if he did report or say anything about the incident.

He also stated that during the beating they made statements to him to the effect that they were not going to hurt him "too much" because his brother worked for the state. However, they also stated to him that his brother could not provide anymore assistance to him as his brother lived far away. The respondent testified that his father reported this beating to the police.

The respondent also testified that he ultimately made the decision to leave the Ukraine in 1999. He traveled through England (where he stayed in transit for two days) to Mexico (where he stayed for two weeks), ultimately arriving in the United States.

He testified that he maintains contact with his parents and one brother who currently reside in the Ukraine. The respondent also has a brother that resides in the Detroit, Michigan area who is a lawful permanent resident after winning the Diversity Visa

Lottery. His brother who lives in the United States came to the United States in 2002.

In any event, the respondent again testified that he maintains contact with his family who currently reside in the Ukraine, and he was told that his brother Ivan died in a car accident. He testified that he asked his parents specifically what had happened and his parents informed him that his brother Ivan and two others died in a car accident. The respondent testified that his father informed him that it was his father's belief that the car accident was either staged or was as a result of the respondent being sought after by these thugs.

Specifically, the respondent testified that his father and his family believe that the car accident was essentially staged to cover up a beating of the brother. He testified that he believes that his brother was beaten because he had a picture from the brother's funeral which, in his review, indicates that his brother had been beaten and that there was an examination done of the car after the accident and the car had not been significantly or did not show signs of significant damage.

His father further informed the respondent that the brother's death was connected to the respondent because the brother that died in the car accident had been approached by these thugs (as best this Court can discern) and asked about the respondent. The respondent finally stated that his father told him that

he believed that they were actually looking for the respondent and beat up his brother instead.

The respondent testified that he again maintains contact with his family in the Ukraine and also reads newspapers regarding country conditions in the Ukraine (when he has an opportunity to do so). Based upon the information that he purportedly obtained from his family members remaining in the Ukraine and from these newspapers, he believes that if he returns to the Ukraine that he would not live or remain alive. He's testified that his father specifically told him that if he returned to the Ukraine that "they" would not allow the respondent to live, and that they had even threatened the respondent's father and asked why the respondent disappeared and why the respondent didn't pay the protection money. The respondent testified that his father told him that although these individuals had threatened the father, they did not touch him because he was old.

Subsequently, after the respondent had testified on direct and cross-examination and during this Court's questioning to clarify certain aspects of the respondent's testimony, the respondent then stated for the first time that his brother, who remains in the Ukraine, also had been threatened, and approached, and questioned about the respondent, and had been beaten three months ago. He also testified that they also demanded money from his brother remaining in the Ukraine.

Statement of the Law
Withholding of Removal Under the Act and
Withholding Under the Torture Convention

An applicant seeking withholding of removal under Section 242(b)(3) must show through facts a "clear probability" that his or her life or freedom would be threatened in the country directed for removal on account of his or her race, religion, nationality, membership in a particular social group, or political opinion. *See INS v. Stevic*, 467 U.S. 407, 413 (1984). In *Mikhailevitch v. INS*, 146 F.3d 391 (6th Cir. 1998), the 6th Circuit Court of Appeals held that in order to qualify for withholding of deportation (now removal), the applicant "must demonstrate that there is a clear probability that he would be subject to persecution" were he to return to his native country. "Clear probability" means that the applicant's facts must establish that it is more likely than not that he would be subject to persecution on one or more of the statutorily enumerated grounds set forth above.

In the instant case, the respondent has also requested that this Court considers his application to be one seeking protection under the Torture Convention. An applicant for withholding of removal under the Torture Convention bears the burden of proving that it is "more likely than not" that he or she would be tortured if removed to the proposed country of removal. *See* 8 C.F.R. Section 1208.16(c)(2) and *Matter of S-B-*, 22 I&N Dec. 1306 (BIA 2000). *See* also *Ali v. Reno*, 237 F.3d 591 (6th Cir. 2001).

For an act to constitute "torture" it must satisfy each of the five elements of the definition of torture found in the regulations. *See* 8 C.F.R. Section 1208.18(a). The act must cause severe physical or mental pain or suffering. In order to constitute torture, mental pain or suffering must be prolonged. *See* 8 C.F.R. Section 1208.18(a)(4). The act must be intentionally inflicted. The act must be inflicted for a proscribed purpose as defined in the regulations. The act must be inflicted by or at the instigation of a public official with the consent or acquiescence of such official who has custody or physical control of the victim. Finally, the act must not arise for the imposition of lawful sanctions. *See Matter of J-E-*, 23 I&N Dec. 219 (BIA 2002).

The term "activity constituting torture" does not simply refer to general violence. Rather, the referenced activity must be the very torture that the applicant claims to fear. *Matter of S-B-*, *supra*. The existence of a consistent pattern of gross, flagrant or mass violations of human rights in a particular country does not, as such, constitute a sufficient ground alone for determining that a particular person would be in danger of being subjected to torture upon his or her return to that country. *See Castellano-Chacon v. INS*, 341 F.3d 533 (6th Cir. 2003).

Analysis

Credibility

The credibility of a respondent is of extreme importance in assessing his or her claims for relief and protection. Indeed, this Court is given the primary responsibility for judging the credibility of the witnesses that appear before it. Before determining whether an applicant meets the statutory criteria required for withholding of removal under the Act and withholding under the Torture Convention, this Court must make a threshold determination of the applicant's credibility. *See* for example *Matter of O-D-*, 21 I&N Dec. 1079 (BIA 1998).

Credibility is a critical factor in determining whether a valid claim of persecution has been established. *Matter of Fuentes*, 19 I&N Dec. 658 (BIA 1998). Sometimes the respondent may offer his or her testimony as the only evidence in support of his or her claims for relief from protection, and as such can suffice where the testimony is believable, consistent and sufficiently detailed in light of the general conditions in the home country to provide a plausible and coherent account of the basis for the alleged fear. *Matter of Dass*, 20 I&N Dec. 120, 124 (BIA 1989).

Nonetheless, the protection of corroborating evidence is not optional and respondents must satisfy their affirmative duty to corroborate their claims to the degree they can or otherwise reasonably explain their failure to do so. *See Matter of B-B-*, 22 I&N Dec. 309 (BIA 1998), *Matter of S-M-J-*, 21 I&N Dec. 772

(BIA 1997). The rules pertaining to corroboration are the same for withholding of removal under the Act and withholding under the Torture Convention. Compare 8 C.F.R. Section 1208.16(b) with 8 C.F.R. Section 1208.16(c)(2).

This Court considers many factors in assessing the credibility of those who appear before it. This may include the witness's opportunity and capacity to observe an event, the omission of facts and events in the witness's testimony, internal inconsistencies and discrepancies in the witness's testimony, prior inconsistent statements, the inherent probability in the witness's testimony, contradictory evidence, or the lack of corroborative evidence.

Where an individual's testimony has been detailed, consistent and forthright, the witness's credibility is not necessarily impeached by minor inconsistencies in a written asylum or withholding application. While omissions of fact in a written asylum or withholding application or during testimony may not, in and of themselves, support an adverse credibility determination, the omission of key events coupled with numerous inconsistencies can provide a specific and cogent reason to support and adverse credibility finding. *Matter of A-S-*, 21 I&N Dec. 1106 (BIA 1998).

In the instant case, I have carefully considered the rationality, internal consistency and inherent persuasiveness of the respondent's testimony in reaching

my conclusion with regard to the respondent's credibility. I have also carefully considered the respondent's testimony when compared to his written applications for both forms of withholding and the documents submitted in support of his claims.

While this Court has concerns regarding the lack of immediately and readily available corroborating evidence as it relates to the respondent's family, the Court will not be rendering an adverse credibility finding. The Court would note, however, that the respondent has a brother in the United States who indeed lives in the Detroit, Michigan area (the venue of the respondent's case).

The respondent also testified that his brother did not come to the United States until 2002 and was aware of the purported beating in November 1998 wherein the respondent sustained physical injuries. Yet, the respondent's brother was not offered as a witness nor has there been any statement or affidavit tendered by the brother. The sole reason for the brother's alleged unavailability is the fact that he is a truck driver and apparently is out of the state of Michigan working.

Moreover, despite the fact that the respondent testified that he maintains contact with his family remaining in the Ukraine, there were no affidavits or statements tendered by his parents and his brother in the Ukraine. The respondent's sole reason for not submitting such written statements or affidavits was that he "did not think about it."

Moreover, the Court clearly concluded that when it was questioning the respondent, that the respondent was embellishing his claim as he only then stated that his younger brother who remains in the Ukraine was threatened and beaten up three months ago. Nonetheless, the crux of the respondent's testimony was consistent with what is in his written application. Therefore, again, the Court will not be rendering an adverse credibility finding in this case. The Court will deem the respondent credible.

However, a finding of credible testimony is not dispositive of whether relief should be granted. *See Matter of E-P-*, 21 I&N Dec. 860 (BIA 1997). This Court must consider an applicant's statutory eligibility for the applications sought in light of the evidence in the record of proceedings. The Court will do so below.

Merits

In considering the evidence in the record of proceedings in this case, this Court finds that on the merits, the respondent has failed to establish his eligibility for withholding of removal under the Act, or withholding of removal under the Torture Convention.

First, this Court finds that the single alleged act of mistreatment perpetrated upon the respondent was perpetrated, according to the respondent's testimony, by individuals who he categorized (also in his written application at Exhibit 2) as mafia or thugs.

His written application further states that these mafia individuals or thugs threatened him because they were demanding "protection money."

The Court would again note that an applicant for withholding of removal under the Act must demonstrate that it is more likely than not that he would be subject to persecution on account of one of the statutorily enumerated or protected grounds (i.e., race, religion, nationality, membership in a particular social group, or political opinion). The "on account of" requirement has also been identified as or by the term nexus. Indeed, in *INS v. Elias-Zacarias*, 502 U.S. 476 (1992), the United States Supreme Court found that a respondent must show that his or her fear of persecution arose "on account of" a protected ground.

Therefore, the respondent in this case, seeking withholding of removal under the Act, must establish that the persecution was on account of or has a nexus to a statutorily enumerated or protected ground. There is no nexus in this case. The evidence in the record of proceedings and *the respondent's claims* clearly fails to set forth any evidence from which this Court could discern that this attack and these threats perpetrated against the respondent in the year 1998 to 1999 (and against the respondent's family subsequently) were on account of his race, religion, nationality, membership in a particular social group, or political opinion. *See INS v. Stevic, supra.*

Indeed, the respondent himself has testified that the individuals who threatened him and demanded protection money were either thugs or the mafia. Indeed, in his written application, he categorized or characterized this November 1998 attack as a "mafia-style" attack. (See Exhibit 2, Part B, Question 1A, Page 5.) Furthermore, the respondent himself in his testimony and in his written application indicated that these individuals who purportedly threatened him and attacked him in November 1998 were extorting protection money from the respondent.

The Board of Immigration Appeals in *In re T-M-B-*, 21 I&N Dec. 775 (BIA 1997) held that criminal extortion efforts do not constitute persecution "on account of" a protected ground (in that case political opinion), where it is reasonable to conclude that those who threatened or harmed the respondent were not motivated by the respondent's political opinion (or any other statutorily protected ground). Indeed, the respondent himself testified that these thugs demanded protection money from all business owners or other business owners in the area.

Consequently, this Court finds that the respondent has not established the requisite nexus to a protected ground such that he can establish his eligibility for withholding of removal under the Act. Further underlying this Court's conclusion is the fact that the November 1998 attack resulted in the respondent's having money stolen.

There is a county condition information (which the respondent's counsel himself referenced in his closing) indicating that there had been a significant or substantial increase in criminal activity after the relaxation of the strong grip that was held on many aspects of Ukranian society by the prior Communist regime. Indeed, in the 1999 Profile of Asylum Claims and Country Conditions (see Exhibit 3, Tab B, Page 15), the State Department reports that "many applicants cite mistreatment by criminal elements, often described as 'mafias,' that engage in robbery, extortion, or occasionally kidnaping. Individuals engaging in commercial activities are particularly vulnerable to these groups."

It is interesting that the respondent used several of these key buzz words in his testimony. For example, at the very beginning of his direct examination when asked what he did for a living in the Ukraine he indicated or made reference to being involved in "commercial" activities. It was only upon further questioning that the respondent indicated that he owned an auto parts store. Furthermore, the respondent himself, indicates that he was attacked by thugs in a mafia-style attack.

Again, this mafia-style attack that occurred in November 1998 does not constitute persecution as the evidence in this record fails to establish that it is connected to or was, or has a nexus to, a statutorily enumerated or protected ground.

Furthermore, the doctor's certificate who purportedly treated the respondent indicates simply that the respondent was beaten by "unknown assailants." See Exhibit 2, Tab E. There is absolutely no indication in any of the documents submitted by the respondent (particularly the doctor's certificate at Exhibit 2, Tab E) indicating that the respondent was attacked for his political opinion, or religion, or national origin, or any other protected ground.

Respondent again in his testimony admitted that money was stolen from him. Robbery in light of the backdrop of the increase of criminal activity in the Ukraine after the fall of the Communist regime could have been the goal of these unknown assailants, and respondent was not targeted on account of a protected ground.

Furthermore, the police report that respondent submitted also indicates that the respondent had submitted statements regarding threats of physical violence that were "made by unknown persons." Again, there is absolutely no record evidence that these unknown individuals were targeting the respondent on the basis of any statutorily enumerated or protected ground.[2]

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[2] It is interesting that this police certificate submitted by the respondent indicates that the respondent had repeatedly submitted statements. However, the respondent in his testimony indicated that he did not wish to submit such statements regarding the threats made against him because he felt it was too early to do so.

The respondent states that he was harmed by these thugs or unknown assailants, and that the government of the Ukraine was unwilling or unable to protect him. The Court notes the persecution contemplated by the act (even if this Court were to find that respondent had suffered some sort of persecution) is not limited to the conduct of organized governments but may, under certain circumstances, be committed by individuals or non-governmental organizations. *See Matter of McMullen*, 19 I&N Dec. 90 (BIA 1984), affirmed by *McMullen v. INS*, 788 F.2d 591 (9th Cir. 1986). In such cases, an applicant must establish that the government is unwilling or unable to protect him. *See Matter of Pierre*, 59 I&N Dec. 461 (BIA 1975).

The 7th Circuit Court of Appeals in *Meghani v. INS*, 236 F.3d 843, 847 (7th Cir. 2001) held that "finding persecution ordinarily requires a determination that government authorities if they did not actually perpetrate or incite the persecution, condoned it or at least demonstrate a complete helplessness to protect the victim."

In the instant case, the respondent has failed to establish that the government of the Ukraine was unwilling or unable to protect him. The respondent purportedly made reports to the police regarding the threats made against him. By his own testimony, the respondent stated that the police indicated that they would try to deal with or handle the matter, however, they wanted the respondent to submit a written statement or report. However, according to the

respondent's testimony in direct examination, it was *his* decision or choice not to submit such statements because *he* made the decision that it was too early to submit such statements.

Moreover, the respondent testified that his father made a report of the alleged November 1998 attack on the respondent, and the respondent himself submitted a police report wherein the police acknowledged that they received these reports (see Exhibit 2, Tab D). The report states that the November 1998 attack was registered and was recorded. It also acknowledges that the respondent made other reports of threats. This certainly does not indicate that the government of the Ukraine was unwilling or unable to protect the respondent.

Moreover, it certainly does not establish that the government of the Ukraine perpetrated or incited the attack against the respondent, condoned it or demonstrated a complete helplessness to protect the respondent. It was the respondent's choice not to submit or go forward with a more formal or official report of the threats as he thought it was too early to do so.

Finally, the respondent submitted (at Exhibit 2, Tab C) a news article regarding his alleged November 1998 attack, and even in the news article it is reported that thugs attacked the respondent as he was leaving his friend's house and stole money from the respondent. This again supports that robbery was the goal of these alleged unknown assailants as

opposed to targeting the respondent on some protected ground.

Based upon the foregoing, this Court finds that the respondent has failed to demonstrate that it is more likely than not that he would suffer persecution on account of a protected ground if returned to the Ukraine.

With respect to respondent's application for withholding of removal under the Torture Convention, this Court finds that the respondent has also, on the merits, failed to establish his eligibility for protection under the Torture Convention.

Respondent himself in his written application (see Exhibit 2 and all supporting documents) indicates that the respondent's threats and the alleged attack were perpetrated by thugs or criminals in the Ukraine. Consequently, the respondent has failed to demonstrate that any acts (even if this Court finds that these threats and the November 1998 attack constituted torture) was inflicted by or at the instigation of a public official of the Ukraine, or with the consent or acquiescence of such official who has custody or physical control of the victim.

The respondent has failed to establish any state action or that the acts of mistreatment allegedly perpetrated against him and his family (which amount to criminal extortion) were again instigated by a public official or that a public official of the Ukraine consented to such action. Therefore, this Court finds that the respondent has failed to demonstrate a key

requirement in order to establish a claim under the Torture Convention.

Furthermore, this Court finds that the respondent's claim under the Torture Convention is too speculative for this Court to conclude that it is more likely than not that the respondent would suffer torture if returned to the Ukraine. In order for this Court to find that it is more likely than not that the respondent would suffer torture if returned to the Ukraine, this Court would have to find that it is more likely than not that if the respondent returned to the Ukraine that these unknown assailants would find the respondent, and that it is more likely than not that these unknown assailants or attackers would seek to demand money from the respondent, or seek retribution, or torture the respondent for refusing to pay such demand money.

As the Attorney General held in *In re. J-F-F-*, 23 I&N Dec. 912 (A.G. 2006), if the evidence in a torture claim is inconclusive, then the applicant has failed to carry his burden. In the instant case, the evidence is inconclusive at best that any of these events are more likely than not to occur such that it is more likely than not that the respondent would suffer torture at the hands of these unknown assailants due to his refusal to pay protection money.

Therefore, this Court finds that on the merits, the respondent has failed to demonstrate his eligibility for withholding of removal under the Torture Convention.

ORDERS OF THE COURT

Based upon the foregoing, the Court issues the following Orders:

IT IS THEREFORE ORDERED that respondent's application for withholding of removal under Section 241(b)(3) of the Act be denied;

IT IS FURTHER ORDERED that respondent's application for withholding of removal under Article III of the Convention Against Torture be denied;

IT IS FURTHER ORDERED that respondent be ordered removed to the Ukraine on the charge of removability contained on the Notice to Appear.

/s/ [Illegible]
MARSHA K. NETTLES
U.S. Immigration Judge

IMMIGRATION COURT
477 MICHIGAN AVENUE, SUITE 440
DETROIT, MI 48226

In the Matter of LUGOVYJ, PETRO
Respondent

Case No.: A96-421-862

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on Dec 5, 2006. This memorandum is solely for the convenience of the parties. If the proceedings should

be appealed or reopened, the oral decision will become the official opinion in the case.

[X] The respondent was ordered removed from the United States to Ukraine or in the alternative to

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to or in the alternative to

[ ] Respondent's application for voluntary departure was granted until upon posting a bond in the amount of $ _____ with an alternate order of removal to

Respondent's application for:

[ ] Asylum was ( ) granted ( ) denied ( ) withdrawn

[X] Withholding of removal was ( ) granted (X) denied ( ) withdrawn

[ ] A Waiver under Section _____ was ( ) granted ( ) denied ( ) withdrawn

[ ] Cancellation under Section 240A(a) was ( ) granted ( ) denied ( ) withdrawn

Respondent's application for:

[ ] Cancellation under Section 240A(b)(1) was ( ) granted ( ) denied ( ) withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[ ] Cancellation under Section 240A(b)(2) was ( ) granted ( ) denied ( ) withdrawn. If granted it is ordered that the respondent be issued all

appropriated documents necessary to give effect to this order.

[ ] Adjustment of Status under Section _____ was ( ) granted ( ) denied ( ) withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[X] Respondent's application of (X) witholding of removal ( ) deferral of removal under Article III of the Convention Against Torture was ( ) granted (X) denied ( ) withdrawn.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a _____ until _____.

[ ] As a condition of admission, respondent is to post a $ _____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[ ] Other: _____.

Dated: Dec 5, 2006

/s/ Marsha K. Nettles
MARSHA K. NETTLES
Immigration Judge

Appeal: Waived/[Reserved]
Appeal Due By: January 4, 2007

No. 08-4620

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETRO LUGOVYJ, Petitioner, v. ERIC H. HOLDER, JR., Attorney General,* Respondent.	)	ORDER (Filed Mar. 16, 2009)

Before: MOORE, GILMAN, and WHITE, Circuit Judges.

The petitioner, a native and citizen of Ukraine, seeks review of a final order of removal and moves for a stay of removal pending review. The government opposes the motion for a stay.

The court has the discretion to grant a stay of removal pending consideration of a petition for review. *See* 8 U.S.C. § 1252(b)(3)(B). In ruling on a motion for a stay, the court applies the traditional four-part test governing injunctive relief. *Nwakanma v. Ashcroft*, 352 F.3d 325, 327 (6th Cir. 2003). The four factors – the petitioner's likelihood of success on the merits and irreparable harm, the harm to others, and

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* Pursuant to Fed. R. App. P. 43(c)(2), Attorney General Eric H. Holder, Jr. has been substituted for former Attorney General Michael Mukasey as the respondent in this case.

the public interest – are to be balanced. The petitioner has demonstrated a colorable claim on the merits, *see Fedunyak v. Gonzales*, 477 F.3d 1126 (9th Cir. 2007), and the other factors favor the issuance of a stay.

The motion for a stay of removal pending review is **GRANTED**. This order does not relieve the petitioner of his obligation to comply with any reporting requirements and other conditions of supervision that may be imposed by the government.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green
Clerk

No. 09-963

In the Supreme Court of the United States

PETRO LUGOVYJ, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner was ineligible for withholding of removal under the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*

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In the Supreme Court of the United States

No. 09-963

PETRO LUGOVYJ, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-7) is unreported. The decisions of the Board of Immigration Appeals (Pet. App. 8-13) and the immigration judge (Pet. App. 14-40) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 2009. The petition for a writ of certiorari was filed on February 16, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA or Act), 8 U.S.C. 1101 *et seq.*, provides that an alien may not be removed from the United States to a particular country "if the Attorney General decides that the alien's

life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3).

b. "The burden of proof is on the applicant for withholding of removal" to establish eligibility for relief. 8 C.F.R. 208.16(b), 1208.16(b).[1] An applicant can meet his burden in one of two ways. First, an applicant's demonstration that he has "suffered past persecution in the proposed country of removal on account of" an enumerated ground creates a rebuttable presumption that he would face future persecution if returned to that country. 8 C.F.R. 208.16(b)(1)(i), 1208.16(b)(1)(i). Second, an applicant who has not suffered past persecution can offer other evidence "that it is more likely than not that he * * * would be persecuted on account of" an enumerated ground if he were removed to a particular country. 8 C.F.R. 208.16(b)(2), 1208.16(b)(2). The Board of Immigration Appeals (BIA or Board) has construed the term "persecution" to be limited to "the infliction of harm or suffering by a government, or persons a government is unwilling or unable to control." *In re Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996).

c. The INA does not define "particular social group." In a precedential decision issued in 1985, the BIA described that phrase as referring to a "group of persons all of whom share a common, immutable characteristic"

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[1] This requirement is now codified at 8 U.S.C. 1231(b)(3)(C), which was added to the INA by Section 101(c) of the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 303-304. That provision is not applicable to this case, however, because petitioner filed his application for withholding of removal before the effective date of the REAL ID Act. Compare Pet. App. 16 n.1 (application filed on Oct. 29, 2004), with REAL ID Act § 101(h)(2), 119 Stat. 305 (effective date of May 11, 2005).

that "the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), overruled in part on other grounds by *In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987).

Between 1985 and 1997, the Board's decisions identified four "particular social groups": persons identified as homosexuals by the Cuban government;[2] members of the Marehan subclan of the Darood clan in Somalia;[3] "young women of the Tchamba-Kunsuntu Tribe [of northern Togo] who have not had [female genital mutilation (FGM)], as practiced by that tribe, and who oppose the practice";[4] and Filipinos of mixed Filipino and Chinese ancestry.[5] Several of these decisions relied not only on an immutable/fundamental group characteristic, but also on the recognizability of the group in the pertinent society. See *In re V-T-S-*, 21 I. & N. Dec. 792, 798 (B.I.A. 1997); *In re H-*, 21 I. & N. Dec. 337, 342-343 (B.I.A. 1996).

Between 2006 and 2008, in response to the evolving nature of claims and developing case law in the courts of appeals, the BIA issued four precedential decisions that were designed to provide "greater specificity" in defining the phrase "particular social group." *In re S-E-G-*, 24 I. & N. Dec. 579, 582 (B.I.A. 2008).[6] Those decisions

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[2] *In re Toboso-Alfonso*, 20 I. & N. Dec. 819, 821-823 (B.I.A. 1990).

[3] *In re H-*, 21 I. & N. Dec. 337, 342-343 (B.I.A. 1996).

[4] *In re Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996).

[5] *In re V-T-S-*, 21 I. & N. Dec. 792, 798 (B.I.A. 1997).

[6] On December 7, 2000, the former Immigration and Naturalization Service issued a proposed rule that would have provided guidance regarding the definitions of "persecution" and "membership in a

restated the immutable/fundamental characteristic requirement. See *In re A-M-E-*, 24 I. & N. Dec. 69, 73-74 (B.I.A.), aff'd *sub nom. Ucelo-Gomez* v. *Mukasey*, 509 F.3d 70 (2d Cir. 2007); *In re C-A-*, 23 I. & N. Dec. 951, 956 (B.I.A.), aff'd *sub nom. Castillo-Arias* v. *United States Att'y Gen.*, 446 F.3d 1190 (11th Cir. 2006), cert. denied, 549 U.S. 1115 (2007). They also "reaffirmed" (*In re A-M-E-*, 24 I. & N. Dec. at 74) that, consistent with the Board's previous decisions, a qualifying social group must possess a recognized level of "social visibility," which describes "the extent to which members of a society perceive those with the characteristic in question as a member of a social group." *In re E-A-G-*, 24 I. & N. Dec. 591, 594 (B.I.A. 2008). The Board also referred to guidelines issued by the United Nations High Commissioner for Refugees (UNHCR), which discuss the "visibility" of a proposed group and whether the group is perceived as such by the pertinent society. *In re C-A-*, 23 I. & N. Dec. at 956, 960.

The Board's recent decisions also state that the analysis of "particular social group" claims involves consideration of whether the group in question is defined with sufficient "particularity." *In re A-M-E-*, 24 I. & N. Dec. at 74, 76; *In re C-A-*, 23 I. & N. Dec. at 957. The proposed group cannot be too "amorphous" or "indeterminate" or be defined by a characteristic "too subjective, inchoate, and variable to provide the sole basis for membership." *In re A-M-E-*, 24 I. & N. Dec. at 76. The Board also stated that it will consider whether the proposed group "share[s] a common characteristic other than their risk of being persecuted," or instead is "de-

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particular social group." 65 Fed. Reg. 76,588. That proposed rule has been neither withdrawn nor finalized during the subsequent nine years.

fined *exclusively* by the fact that [the group] is targeted for persecution." *In re C-A-*, 23 I. & N. Dec. at 956, 960 (citation omitted); see *id.* at 957 (finding group of "non-criminal informants" "too loosely defined to meet the requirement of particularity").

2. Petitioner is a native and citizen of Ukraine who entered the United States without authorization in 1999. In 2003, the Department of Homeland Security (DHS) commenced removal proceedings. Petitioner admitted the factual allegations against him, and an immigration judge (IJ) found that he was removable from the United States. Petitioner sought withholding of removal. Pet. App. 14-15 & n.1.[7]

3. After a hearing, the IJ denied petitioner's request for withholding of removal and ordered him removed to Ukraine. Pet. App. 14-38. The IJ had "concerns regarding the lack of immediately and readily available corroborating evidence," and she found that petitioner had "embellish[ed] his claim" in certain respects. *Id.* at 26-27. The IJ concluded, however, that "the crux of [petitioner's] testimony was consistent with what is in his written application" and stated that she would "deem [petitioner] credible." *Id.* at 27.

The IJ nevertheless identified two reasons why petitioner was ineligible for withholding of removal. First,

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[7] Petitioner conceded that he was ineligible to apply for asylum because he did not seek that form of relief within one year of his arrival in the United States. Pet. App. 15; see 8 U.S.C. 1158(a)(2)(B). In addition to withholding of removal, petitioner also sought protection under the regulations implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess (1988), 1465 U.N.T.S. 85. See Pet. App. 10. That latter request for relief, however, is not before this Court. See Pet. i n.1.

the IJ found that petitioner failed to establish that any past harm he suffered "was on account of or ha[d] a nexus to a statutorily enumerated or protected ground." Pet. App. 28. The IJ observed "that the single alleged act of mistreatment perpetrated upon" petitioner was done by people who petitioner described as "mafia or thugs." *Id.* at 27. The IJ further noted that petitioner stated "that these thugs demanded protection money from all business owners or other business owners in the area," and that they had stolen money from petitioner during "the November 1998 attack" that petitioner described in his testimony. *Id.* at 29. The IJ thus concluded that petitioner had been the victim of "criminal extortion" and "[r]obbery," and she found "absolutely no record evidence that [the] unknown individuals [who attacked petitioner] were targeting [him] on the basis of any statutorily enumerated or protected ground." *Id.* at 29, 31.

Second, the IJ concluded that petitioner had not suffered "persecution" because the harm in question was not inflicted by the government or its agents and petitioner "failed to establish that the government of the Ukraine was unwilling or unable to protect him." Pet. App. 32. The IJ noted that petitioner reported the November 1998 attack to the police, who told him "that they would try to deal with or handle the matter." *Ibid.* The IJ further noted, however, that petitioner chose not "to submit a written statement or report" as requested by the police because "*[petitioner]* made the decision that it was too early to submit such statements." *Id.* at 32-33.

4. Petitioner appealed to the BIA, which dismissed his appeal in a non-precedential, single-member order. Pet. App. 8-13. The Board stated that it "adopt[ed] and

affirm[ed]" the IJ's decision, but it also made certain "additions" in response to arguments raised by petitioner on appeal. *Id.* at 8.

The Board gave three reasons for rejecting petitioner's assertion that he had suffered persecution "on account of his membership in a particular social group" consisting of "persons refusing to give in to demands of criminal gangs [operating] with impunity because of the actions of corrupt government officials." Pet. App. 9 (internal quotation marks omitted). First, the Board concluded that petitioner's proposed group failed to satisfy "the requisite standards of 'social visibility' explained in some of * * * [the Board's] recent decisions." *Ibid.*; see pp. 3-4, *supra*. Second, the Board emphasized that petitioner "does not really know who harmed him," Pet. App. 9, and it stated that "criminal extortion efforts do not constitute persecution on account of a protected ground where there is no indication that the perpetrators had any interest in [an applicant for withholding of removal] beyond his identity as a business owner who had money," *id.* at 10.

Third, the Board found "no indication that the persons who demanded money from [petitioner] or the persons who harmed [him] were operating with impunity because of the actions of corrupt government officials." Pet. App. 10. The BIA noted that petitioner "admitted that he did not know of any specific connection between the criminals and the Ukranian government," and it stated that petitioner's "conjecture * * * that a connection may have existed does not sufficiently evidence such a connection." *Ibid.* The Board also stated that "[t]he fact that there is background evidence which indicates that some government officials in the Ukraine are corrupt[] does not result in a finding that any of those

officials were involved in this particular case." *Id.* at 10-11.

5. Petitioner filed a petition for judicial review of the BIA's order, which the court of appeals denied in an unpublished decision. Pet. App. 1-7. The court observed that petitioner had not "draw[n] our attention to any evidence that was overlooked by the [IJ] and the Board," *id.* at 4, and the court agreed with the IJ and the Board that petitioner failed to produce "*evidence* linking the harm suffered by petitioner to a protected ground and to government complicity," *id.* at 5.

The court of appeals also stated that it was "unpersua[ded]" by petitioner's assertion that his "mere defiance of unidentified thugs' extortion demands renders him a member of a protected social group." Pet. App. 5. The court explained that such a proposed group "is not based on any cognizable immutable characteristic" and "is impermissibly circular" because the members of a qualifying "particular social group" "must share a narrowing characteristic other than their risk of being persecuted." *Id.* at 6 (quoting *Rreshpja* v. *Gonzales*, 420 F.3d 551, 556 (6th Cir. 2005)).

Judge Merritt filed a brief concurring opinion. Pet. App. 6-7. He explained that "the refusal of a business man to pay protection money to private individuals who violate local criminal law is not a basis for withholding of removal." *Id.* at 6. Judge Merritt further explained that the record contained no "basis for finding that government officials were in fact implicated in the harm," and he noted that "[p]etitioner's brother had been appointed as a police officer which, at least on the surface, demonstrates a lack of government hostility." *Id.* at 6-7. Judge Merritt also noted that "[t]here are many places in the United States where citizens are not safe from

harm from criminal activity," and he stated that if an alien could avoid removal based on "private threats, probably every country in the world would qualify as a place from which we should withhold removal." *Id.* at 7.

ARGUMENT

1. Petitioner's principal arguments (Pet. 5-12) involve the proper manner of determining whether an asserted set of people constitute a "particular social group" for purposes of the statutes governing asylum and withholding of removal. Those claims do not warrant further review.

a. This case would be an unsuitable vehicle for addressing any issues about the proper manner for determining any questions about the meaning of "particular social group" because the unpublished decision below also rests on two other independent and case-specific grounds. Accordingly, resolution of the social group question is not necessary to the proper resolution of petitioner's application for withholding of removal.

Simply being a member of a "particular social group" does not make a person eligible for withholding of removal. Instead, an applicant *also* must demonstrate that he has suffered past "persecution" or is likely to suffer future persecution *and* that such persecution was or would be "on account of" his membership in the social group. 8 C.F.R. 208.16(b)(1) and (2); 1208.16(b)(1) and (2). The court of appeals correctly held that petitioner did not satisfy either of those additional requirements.

First, as the IJ, the BIA, and the court of appeals all concluded, petitioner failed to demonstrate that any harm he suffered was "because of" (8 U.S.C. 1231(b)(3)) or "motiv[ated by]" (*INS* v. *Elias-Zacarias*, 502 U.S. 478, 483 (1992)) his membership in his proposed social

group. To the contrary, as the BIA explained, the record contains no evidence that the people who attacked petitioner "were motivated by anything other than financial gain." Pet. App. 9; accord *id.* at 4-5 (court of appeals); *id.* at 27-31 (IJ). Although petitioner disagrees with that holding, see Pet. 13-14, this factbound issue does not warrant this Court's review, see pp. 13-14, *infra*.

Second, petitioner also failed to demonstrate that any harm he suffered constituted "persecution." As the IJ explained, an act does not constitute "persecution" unless either it was perpetrated by the government or its agents or the applicant "establish[es] that the government is unwilling or unable to protect him." Pet. App. 32 (citing *In re Pierre*, 15 I. & N. Dec. 461 (B.I.A. 1975)). As the IJ, the BIA, and the court of appeals all concluded, petitioner "failed to establish that the government of the Ukraine was unwilling or unable to protect him." *Ibid.*; accord *id.* at 5 (court of appeals); *id.* at 10-11 (BIA). That factbound issue does not warrant this Court's review.

b. Even if the determination of whether petitioner is a member of a "particular social group" were necessary to the proper disposition of his application for withholding of removal (and in this case it is not), petitioner's claims still would not merit this Court's review.

i. The BIA has long been of the view—and recently reaffirmed—that whether a proposed group qualifies as a "particular social group" must "be determined on a case-by-case basis." *In re C-A-*, 23 I. & N. Dec. 951, 955 (B.I.A. 2006) (quoting *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985)). Cf. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 448 (1987) (stating that "[t]here is obviously some ambiguity in a term like 'well-founded fear,'"

which is used in the statutes governing asylum, "which can only be given concrete meaning through a process of case-by-case adjudication"). Petitioner identifies no court of appeals that has held that "persons [who] refus[e] to 'give in to demands of criminal gangs [operating] with impunity because of the actions of corrupt government officials'" constitute a "particular social group." Pet. App. 9 (third brackets in original). There is thus no conflict among the lower courts with respect to the specific question presented in this case.

ii. Petitioner suggests that, in determining whether a "particular social group" exists, some lower courts have impermissibly treated "social visibility as a requirement rather than a relevant factor." Pet. 5 (emphasis omitted); see Pet. 5-10; see pp. 3-5, *supra* (describing the BIA's precedential decisions regarding "social visibility"). Even if that were true, however, this case would present no opportunity for this Court to consider the issue, because the court of appeals' unpublished decision in this case contains no discussion of the "social visibility" of petitioner's proposed group. See Pet. App. 1-7; see *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 109 (2001) (stating that this Court "ordinarily 'do[es] not decide in the first instance issues not decided below'" (citation omitted)). For the same reason, this case also presents no occasion for this Court to consider (see Pet. 7-8) whether "social visibility" may be considered at all in determining whether an applicant for withholding of removal has carried his burden of demonstrating membership in a particular social group. See Br. in Opp. at 10-14, *Contreras-Martinez* v. *Holder*, No. 09-830 (filed Apr. 14, 2010) (describing cases in the lower courts with respect to that issue).

iii. Petitioner also asserts that the lower courts have been "inconsistent[]" in applying the principle that members of a "particular social group" "must share a characteristic other than the risk of persecution." Pet. 10 (emphasis omitted). Petitioner does not contend, however, that the court of appeals' unpublished decision in this case conflicts with any specific decision of another court of appeals with respect to this point.[8] Instead, petitioner suggests that "*[i]f* the scenario" considered by a 15-year-old Eighth Circuit decision "was altered slightly" to more closely resemble this case, *then* the Eighth Circuit would "*most likely* find that [the modified group] constitutes a social group." Pet. 11-12 (emphasis added). That kind of speculation is plainly insufficient to demonstrate the existence of a conflict in the lower courts that would warrant this Court's review.

Petitioner also criticizes the court of appeals for "fail[ing] to consider [his proposed] group in the context of country conditions." Pet. 10. But the court's decision expressly refers to "State Department reports of general conditions in Ukraine." Pet. App. 4-5; see *id.* at 10-11 (BIA describing "background evidence which indicates that some government officials in the Ukraine are corrupt"). In addition, the court of appeals distinguished a 2007 Ninth Circuit decision that held that a Ukrainian businessman was eligible for both asylum and

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[8] Petitioner does assert (see Pet. 11) that the decision of the court of appeals conflicts with its own previous decision in *Al-Ghorbani* v. *Holder*, 585 F.3d 980 (6th Cir. 2009). The court of appeals perceived no such conflict, and an intracircuit conflict would not warrant this Court's review in any event. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

withholding of removal, reasoning that that case involved a situation in which the alien suffered "retaliation * * * for acting against government corruption." *Id.* at 5 (discussing *Fedunyak* v. *Gonzales*, 477 F.3d 1126 (2007)). Here, in contrast, the court of appeals explained that "there is no evidence of governmental involvement in the extortion or the ensuing beating and robbery. Nor is there evidence that petitioner engaged in such political activity as opposing or criticizing the government's participation in or failure to stop the extortion scheme." *Ibid.* The decision of the court of appeals thus flowed from a close consideration of the particular facts of petitioner's case rather a failure to consider its broader context.

2. Petitioner also briefly argues (Pet. 13-14) that the court of appeals erroneously required him to present "direct evidence" that the people who attacked him did so because of his membership in a particular social group. The court of appeals did not say, however, that petitioner was required to present "direct evidence." Thus, although petitioner is correct that this Court's decision in *Elias-Zacarias* states that an applicant is not required "to provide direct proof of his persecutors' motives," 502 U.S. at 483, there is no conflict between that statement and the court of appeals' decision in this case.

In addition, contrary to petitioner's assertion, the court of appeals did "provid[e] an explanation of why" the "reports and news articles about country conditions * * * were not sufficient" to demonstrate eligibility for withholding of removal. Pet. 13. As petitioner acknowledges, the court of appeals stated that "what remain[ed] lacking" was "*evidence* linking the harm suffered by petitioner to a protected ground." Pet. App. 5; see *id.* at 9 (BIA observing that petitioner "does not really know

who harmed him, nor is there any indication that their actions were motivated by anything other than financial gain"). Petitioner may disagree with whether the court of appeals was correct with respect to that case-specific assessment. That sort of factbound issue, however, does not warrant this Court's review.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9] Petitioner also asserts that the court of appeals' decision conflicts with its own previous decision in *Mostafa* v *Ashcroft*, 395 F.3d 622 (6th Cir. 2005), which petitioner describes as having held that reports about "general political conditions in a country are admissible at a" removal hearing. Pet. 13. In this case, however, the court of appeals did not refuse to consider the State Department reports of general conditions in Ukraine; it merely held that those reports were insufficient to demonstrate a link between the harms petitioner suffered and his membership in a particular social group. Pet. App. 4-5. In any event, an intracircuit conflict would not warrant this Court's review. See *Wisniewski*, 353 U.S. at 902 (per curiam).